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No. 91-873

Supreme Court, U.S.
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In The Supreme Court of the United States October Term, 1991

MARTIN RYAN, BERNARD MCKAY, JOSEPH COGLIANESE, LOUIS EISEN, BERNARD HOGAN, PATRICIA DARCY, SYLVIA WALSH and KATHERINE DOYLE, Class Representatives of the December 31, 1987 participants in the City's Annuitant Healthcare Program, *Petitioners,*

vs.

CITY OF CHICAGO, a Municipal Corporation, and MARSHALL KORSHAK, RUSSELL EWERT, ODELL HICKS, THOMAS D. ALLISON, FRED W. SETTLES, CECIL A. PARTEE, CHESTER JASKOLKA, RONALD R. NORRIS and JAMES MC DONOUGH, in their capacity as the Board members of the Policemen's Annuity & Benefit Fund for cities over 500,000; MICHAEL A. COHEN, NORMAN S. HOLLAND, ANN FOLEY, JAMES R. CONMEY, WALTER S. KOZUBOWSKI, RONALD D. PICUR, RONALD MALONEY, and CECIL A. PARTEE, in their capacity as the Board members of the Firemen's Annuity & Benefit Fund for Cities over 500,000; WILLIAM J. MC MAHON, RONALD D. PICUR, CECIL A. PARTEE, WAYNE N. MARSHALL, and EDWARD J. LAIRD, in their capacity as the Board members of the Municipal Employees' Annuity & Benefit fund for Cities over 500,000; ROGER E. MC MAHON, RONALD D. PICUR, CARMEN IACULLO, and CECIL A. PARTEE, in their capacity as the Board members of the Laborers' & Retirement Board Employees' Annuity & Benefit Fund for Cities over 500,000, *Respondents.*

On Petition for Writ of Certiorari To the Supreme Court of Illinois

REPLY BRIEF FOR PETITIONERS' IN SUPPORT OF THEIR PETITION FOR CERTIORARI

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Introductory Statement

The City's response first miscasts the nature of this as a dispute over gratuitous contributions to healthcare costs. Rather, the petitioners seek to enforce of a promised health care plan. The City then miscasts the issue as the trustees' power to compromise claims "involving trust assets". It is not. The issue is whether the Pension trustees opposing the participant class

adversely may compromise the City Healthcare Plan participants' direct personal claims against both the City (for a promised healthcare plan) and against the Pension Funds (for a promised subsidy) — claims with respect to which the Pension Funds trustees were adverse parties, not privy, to the participants, and were not entitled to prejudice the participants' claims.

Misstatement of the Question Presented

The City's brief misstates the questions presented. There is no such Illinois "rule of privity" that enables trustees to compromise beneficiaries' direct class claims against third parties.

As we have stated the questions before they are:

1) Whether, in three-party class litigation in state court, a court's dismissal of the class' claims with prejudice, based upon a settlement agreed to solely by the two parties opposing the class, deprives the class of its due process rights under the Fourteenth Amendment;

or, stated otherwise,

Whether this Court's holding in *Firefighters v. Cleveland*, 478 U.S. 501, 529-30 (1986) (that a settlement between some of the parties to a case cannot dispose of the claims a nonconsenting third party certified intervenor class), applies to invalidate a state court's dismissal with prejudice of the claims of an intervenor class upon the agreement solely of the parties opposing the class;

2) Whether in three-party state court class litigation, the enactment of state legislation purporting to extinguish the class' claims, pursuant to an agreement solely between the parties opposing the class, constitutes an invalid impairment of contract in violation of the Contract Clause, Art. 1, § 10 of the United States Constitution.

The City's Misstatements of Fact

The City, at 2, misstates this dispute as over the amount of money the City "contributes to the healthcare costs of retirees." Rather, the dispute has always been whether the City, having promised its employees and previously maintained a lifetime

fixed-rate retiree healthcare plan (the City of Chicago Annuitant Medical Benefits Plan, the "Plan") would be able to change or terminate that plan post-retirement, and whether the trustees could terminate their subsidy of the City's Plan.[1]

The City also misrepresents the intervenors' role, as if they first intervened at the end of the case to object to the settlement. In fact, they petitioned to intervene from the very beginning of the case, prior to most of the Funds; C.13 (November 23, 1987) and 251-259 (December 8, 1987), actively litigated through the formal grant intervention May 5, 1988 C. 793, and they were active party litigants thereafter in the following trilateral litigation involving the City, the Funds and the participants. Their June 10, 1988 motion for class certification (C. 961) was often deferred, but ultimately granted with the 1987 participants certified as a class. October 11, 1989, C. 1602, 1605, and the class certification was not limited to a certification for settlement purposes, but rather was a general certification. *Id.*

The City, at 4, also wrongly states that the participants supported the decision to hold the fairness hearing instead of rendering a decision on the merits. Originally on June 30,1989 and again on November 21, 1989 the intervenors asked the court to rule on the class' motion for summary judgment on the merits ahead of, or at the same time as, the fairness hearing (R.C. Vol. V, Item 12 and December 5, 1989 (C. 2170).

Thus, City's the basic misrepresentation of the facts is as if the litigation was two-way between the City and the Funds only, with the intervenors coming in only after the settlement was reached. Instead, the intervenors were present from the beginning, participated in the litigation actively, through the discovery and at the June 1988 trial, in pursuit of their claims *against the City* to force it to continue coverage under its promised plan. Indeed, the intervention was granted explicitly in recognition that the interests of the trustees and the participants might become divergent. Transcript of May 5, 1988 decision at 20, C. 793.

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[1] See Participants and Funds Interventions Counter-Complaints and Requests for Injunction R.C 13, 28, 67, 98, 183, 253, 283 and 341.

ARGUMENT IN REPLY

A TRUSTEE'S AUTHORITY TO COMPROMISE CLAIMS OF THE TRUST WITH RESPECT TO TRUST ASSETS HAS NEVER BEEN INTERPRETED TO INCLUDE THE RIGHT TO COMPROMISE THE BENEFICIARIES' PERSONAL CLAIMS AGAINST THIRD PARTIES.

Contrary to the City's response, City at 5, this case does not involve a trustee's compromise of claims involving *trust assets*.[2] Quite different, the claims at issue here were annuitants' direct claims: (i) against the City, that the City as their employer, had promised them a lifetime fixed-rate healthcare coverage plan during their employment; and (ii) against the Funds for a certain subsidy. The City does not in any way answer our argument that the trustees had absolutely no right to compromise the retirees' direct claims against the City-employer for contract, estoppel and vested rights, which were direct claims of the participants *against the City*, not derivative claims of the Funds. See our Petition at 10-13.

The issue was clearly preserved. The City is absolutely wrong in representing at 4 that "petitioners never objected to the Circuit Court decision to enter judgment." Rather, petitioners objected to the settlement and on June 30, 1988 moved for summary judgment on their claims, and repeatedly thereafter asked that their summary judgment motion be addressed prior to or at the same time as the other parties settlement. R.C.1602 October 11, 1989 and November 21, 1989 proceeding and ruling R. Vol. 5 Item No. 12, R.C. 3521. This was refused. The Petitioners never agreed that the court "need not decide the merits of the original

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[2] The three cases cited by the city deal solely with trustees' exercise of authority over a trust's assets. *In re Moir Hotel Co.*, 186 F.2d 377, 381-2 (7th Cir. 1951) (absent fraud, etc., trustees have discretion in voting trust shares differently from choice sought by minority holders of the trust); *Continental National Bank v. Sever*, 393 Ill. 81, 93, 65 N.E.2d 385, 391 (1946) (application of *cy pres* in expenditure of charitable trust's assets); and *Childs v. National Bank of Austin*, 658 F.2d 487 (7th Cir. 1981) (trust document interpreted to permit trustees to administer majority shares of bank in spite of conflict position of same person being trustee and bank chairman, where conflict was implicitly waived by testator.)

claims in the case". (City at 4) We asked that our motion on the merits be addressed first. And this was raised at each level of the process on appeal.

The City also misrepresents at 4, the basis for the Appellate Court's omission to address these claims. The Appellate Court gave absolutely no reason for evaluating the case solely on the issue of whether the settlement was substantively fair. It gave no reason for failing to address the due process claim made in the brief and repeated in request for rehearing, that the procedure to dismiss the participants' claims based solely on agreement of the other parties in the litigation was clear violation of our due process rights.

In sum, this case is just no different than if two defendants, having been sued, reach an agreement between themselves, then ask the court to determine that the agreement is fair and impose it on the plaintiffs, and the judge then enters the agreement and dismisses the plaintiffs' case with prejudice. There is simply no such "cram down" provision in class actions or general civil litigation, for that matter.

No participant - *not one* - testified in favor of the settlement. This is of some importance to note, since the City and the Funds went to some great effort to solicit retirees to testify in support of the settlement (see, e.g., Bernard Sweeney testimony at November 27, 1989 Fairness Hearing at 120. R. Vol. 5) But, the only participant testimony (500 written objections plus live testimony limited to ten persons by the court) unanimously opposed the settlement.

At 3, the City's use of *Firefighters v. City of Cleveland,* 478 US 501 (1986) for the notion that an intervenor may not block an agreement between two settling parties, omits mention that the consent decree there did "not purport to resolve" the non-consenting intervenors' claims. *Firefighters,* 478 US at 530. In contrast, the City and Funds here *did* purport to prejudice the class' direct claims against the City to continue the promised program and against the Funds to continue the subsidy. The participants here may not have been able to block an agreement between the City and the trustees concerning their rights *inter se.* But the City and the trustees here could not by an agreement

foreclose the retirees contractual healthcare claims against the settling parties.

The City's argument (at 6) that our position would prevent a trustee from settling claims of a trust over any beneficiary's objection is also just wrong. Trustees have the right to settle claims which are the trust's. They do not have authority to compromise claims which are the beneficiaries'. This critical distinction here is between derivative claims for the entity (which a trustee or corporate director may usually settle) versus direct claims of the beneficiary class (which are not the trustee or director's to settle) has been oft addressed in both shareholder and trust litigation. (See our Petition for Certiorari at 11).

CONCLUSION

The notion that two parties involved in three-party litigation may agree to have dismissed with prejudice the non-derivative third-party claims of the class opposing them is so abhorrent to fundamental due process notions that the petition for a writ of certiorari should be granted and the case summarily sent back for review in light of this court's holding in *Firefighters v. City of Cleveland.*

Respectfully submitted,

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